S T A T E OF M I C H I G A N
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
W. Whitbeck, P.J., M. Talbot and C. Murray, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
-vs- **No. 130353**

BOBBY LYNELL SMITH,

Defendant-Appellee.
_____/
Court of Appeals No. 257353
Circuit Court No. 2004-195521 FC

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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The Court of Appeals did not specifically address this question.

The People contend the answer is, for the most part "yes", but, in addition to the factors listed in *Robideau*, it is also worthwhile to compare the elements of the respective offenses, as discussed in *Blockburger*, in assessing whether offenses are the "same".

II. UNDER THE MICHIGAN CONSTITUTION ARE FELONY-MURDER AND THE PREDICATE FELONY THE "SAME" OFFENSE FOR DOUBLE JEOPARDY PURPOSES, THEREBY PRECLUDING MULTIPLE PUNISHMENTS? MOREOVER, FOR PURPOSES OF THE INSTANT CASE, ARE FELONY-MURDER AND A NON-PREDICATE FELONY ARISING OUT OF THE SAME TRANSACTION THE "SAME" OFFENSE?

The Court of Appeals answered, "Yes".

The People contend the answer is, "No".

III. DOES PUNISHMENT FOR BOTH FELONY-MURDER AND THE PREDICATE FELONY VIOLATE THE MULTIPLE-PUNISHMENT STRAND OF DOUBLE JEOPARDY UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION? MOREOVER, FOR PURPOSES OF THE INSTANT CASE, IS THAT PROTECTION VIOLATED BY PUNISHMENTS FOR FELONY-MURDER AND A NON-PREDICATE FELONY ARISING OUT OF THE SAME TRANSACTION?

The Court of Appeals did not specifically address this issue.

The People contend the answer is, "No".

Defendant argued below that the answer should be, "Yes".

STATEMENT OF FACTS

On July 26, 2004, a jury found Defendant Bobby Lynell Smith guilty as charged of two counts of felony-murder (during the perpetration of a larceny), MCL 750.316, two counts of armed robbery, MCL 750.529, and four counts of felony-firearm, MCL 750.227b (28a). On August 11, 2004, Judge Nanci Grant sentenced Defendant to life in prison for the murders, and 17½-50 years for the robberies, these sentences to run consecutively to 2-year prison terms for the felony-firearm offenses. Defendant appealed as of right to the Court of Appeals. The Court of Appeals affirmed Defendant's felony-murder convictions and the two counts of felony-firearm that accompanied those murder offenses, but vacated the armed robbery convictions as well as the felony-firearm counts that accompanied the robbery offenses. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, decided December 27, 2005 (Docket No. 257353) (29a). By order dated May 30, 2006, this Court granted the People's application for leave to appeal from that portion of the Court of Appeals opinion that vacated those convictions (32a).

This case arose out of Defendant's robbery and murder of Richard Cummings (age 57) and Stephen Putnam (age 33) during a theft at a tire store in the City of Pontiac. Defendant stole money from the store's cash drawer and from the two victims' persons (see 16a-21a), and he fatally shot both victims in the head.

When the trial proofs were closed, the jury was instructed on the charged offenses of felony-murder as to Mr. Cummings during the course of a larceny, as well as the lesser offense of second degree murder; armed robbery as to Mr. Cummings; felony-murder as to Mr. Putnam during the course of a larceny, as well as the lesser offense of second degree murder; armed

robbery as to Mr. Putnam; as well as four counts of felony-firearm (22a-27a).[1] The jury found Defendant guilty as charged of felony-murder during the course of a larceny as to Mr. Cummings, armed robbery as to Mr. Cummings, felony-murder during the course of a larceny as to Mr. Putnam, armed robbery as to Mr. Putnam, and four counts of felony-firearm (28a).

On appeal, the Court of Appeals vacated the two robbery convictions, as well as the two accompanying felony-firearm convictions on double jeopardy principles,

> Defendant also argues that his convictions for felony murder and armed robbery violate constitutional double jeopardy protections. We agree.
>
> Under the state constitution, a defendant may not twice be placed in jeopardy for a single offense. Const 1963, art 1, § 15. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). It is well established that multiple convictions and sentences for both felony murder and the predicate felony constitute multiple punishments for the same offense and thereby violate double jeopardy protections under the state constitution.[1] *Id.*; see also *People v Wilder*, 411 Mich 328, 345-347; 308 NW2d 112 (1981). The underlying felony is a necessary element of every conviction of felony murder. *Id*. at 346.
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>
> [1] Although we agree with Justice Corrigan's dissent in *People v Curvan*, 473 Mich 896, 903; 703 NW2d 440 (2005), that felony-murder is a distinct category of murder and not an enhanced form of armed robbery, it is not within the province of this Court to overrule precedent set forth by the Michigan Supreme Court, as we are bound to follow its decisions. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 554 (1993).
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> ---
>
> The jury convicted defendant of two counts of felony murder and two counts of armed robbery for robbing and killing the two victims in this case, we disagree with the prosecutor's contention that it is unnecessary to vacate defendant's armed robbery convictions because the predicate felony for the felony murder was larceny, not robbery. Because larceny is a necessarily included lesser offense of robbery, and because, factually, there was no evidence that defendant committed separate offenses of robbery and larceny, defendant's armed robbery convictions violate double jeopardy protections.
>
> Contrary to what defendant argues, the remedy for this double jeopardy violation is not to vacate the convictions and sentences for felony murder. Rather,

[1] The original transcript of the trial proceedings conducted on July 26, 2004, mistakenly omitted some instructions. On or about April 4, 2005, the court reporter filed an Errata sheet correcting the problem.

> the appropriate remedy is to vacate the convictions and sentences for the underlying felonies. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). Accordingly, we vacate defendant's two convictions and sentences for armed robbery.
>
> Because we must vacate defendant's two convictions for armed robbery, we must also vacate two of his convictions for felony-firearm. The jury convicted defendant of two counts each of felony murder and armed robbery, and then found him guilty of four counts of felony-firearm, one for each felony. Defendant could only be convicted of one count of felony-firearm for each felony committed while possessing a firearm. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992), overruled in part on other ground in *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). Accordingly, because defendant's only remaining felony convictions are for two counts of felony murder, we vacate two of his four felony-firearm convictions.
>
> *Smith, supra* slip op pp 2-3 (30a-31a).

The People sought leave to appeal from this portion of the Court of Appeals opinion.[2] On May 30, 2006, this Court granted the People's application, directing two issues to be included among the issues to be briefed,

> On order of the Court, the application for leave to appeal the December 27, 2005 judgment of the Court of Appeals is considered and it is GRANTED. The parties are directed to include among the issues to be briefed: (1) whether *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), or *People v Robideau*, 419 Mich 458 (1984), sets forth the proper test to determine when "multiple punishments" are barred on double jeopardy grounds pursuant to Const 1963, art 1, § 15, taking into consideration this Court's prior precedent in "multiple punishment" claims and the common understanding of "same offense" as it relates to the "multiple punishments" prong of double jeopardy. *Cf. People v Nutt*, 469 Mich 565 (2004), and (2) whether defendant's convictions of armed robbery and felony-murder based on a predicate felony of larceny violated double jeopardy protections under either the *Blockburger* or *Robideau* test.
>
> (32a)

[2] Defendant sought leave to appeal from the affirmance of his other convictions. This Court denied his application on May 30, 2006.

ARGUMENT

I. THE PROPER TEST FOR APPLICATION OF THE MULTIPLE-PUNISHMENT STRAND OF DOUBLE JEOPARDY UNDER ARTICLE 1 § 15 OF THE MICHIGAN CONSTITUTION WAS, FOR THE MOST PART, STATED BY THIS COURT IN *ROBIDEAU*. BUT, IN ADDITION TO THE FACTORS LISTED IN *ROBIDEAU*, IT IS ALSO WORTHWHILE TO COMPARE THE ELEMENTS OF THE RESPECTIVE OFFENSES IN ASSESSING WHETHER OFFENSES ARE THE "SAME".

Standard of Review

A double jeopardy challenge presents a question of constitutional law subject to de novo review. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

Issue preservation

The People argued in the Court of Appeals that double jeopardy did not requires setting aside any of Defendant's convictions in this case.

SUMMARY OF ARGUMENT I

The ratifiers of Michigan's 1963 Constitution intended the state double jeopardy protection to mirror the federal protection. The federal Double Jeopardy Clause includes a protection against multiple punishments for the "same" offense. That protection serves as a limit on the courts and prosecution to ensure that defendants not be subjected to more punishment than was intended by the Legislature. It does not, however, constrain the Legislature, which has the power to define crimes and set parameters for punishment. In a multiple-punishment context, the federal test set forth in *Blockburger v United States*, is a rule of statutory construction used to determine whether Congress intended offenses to be the "same". There is no indication that the ratifiers of the Michigan constitution sought to engraft into the Michigan constitution rules of statutory construction that had been used by the U.S. Supreme Court in applying the constitutional principle. Therefore, *Blockburger* is not incorporated in the Michigan constitution.

The proper test for analyzing multiple-punishment claims under the Michigan constitution was, in large measure, stated by this Court in *People v Robideau*. Under that test the Court looks to traditional sources of legislative intent, such as comparison of the societal interests being served by the respective statutes and analysis of whether the penalties for the offenses are hierachical, when assessing whether the Legislature intended offenses to be viewed as the "same" for purposes of a multiple-punishment claim. Although in *Robideau* this Court did not view the rule of construction expressed in *Blockburger* as useful, the People submit that comparison of the abstract elements of the offenses, as described in *Blockburger*, can prove informative of the topic of legislative intent and, therefore, should be added to the factors listed in *Robideau* when the Court examines multiple-punishment claims.

Analysis

The Fifth Amendment to the United States Constitution provides, ". . . nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb. . . ." US Const, Am V. This provision is applicable to the states. *Benton v Maryland*, 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969); *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981). The Michigan Constitution includes a parallel provision stating, "No person shall be subject for the same offense to be twice put in jeopardy", Const 1963, Art 1 § 15.

These double jeopardy provisions provide three protections: (1) they protect against a second prosecution for the same offense after acquittal, (2) they protect against a second prosecution for the same offense after conviction, and (3) they protect against multiple punishments for the same offense. *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 656 (1969); *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The first two

protections address successive prosecutions. At issue in this case is the third protection – the protection against multiple punishments for the same offense.

A. The ratifiers of the Michigan constitution intended the scope of Michigan's double jeopardy provision to be coextensive with the parallel provision of the United States Constitution.

In interpreting provisions of the Michigan Constitution, the goal is to discern the original meaning attributed to the provision by its ratifiers. *Nutt* 469 Mich at 573-574. In *Nutt*, 469 Mich at 588-591, this Court held, after reviewing the constitutional history, that the Michigan double jeopardy provision was intended by its ratifiers to be construed consistent with the federal double jeopardy provision, and consistent with prior Michigan caselaw. See also *People v Davis*, 472 Mich 156, 161; 695 NW2d 45 (2005). Although *Nutt* was a successive-prosecution case, its conclusion on this point applies with equal force to multiple-punishment cases because, after all, the same constitutional provision/language is being applied in both contexts and there is no separate constitutional history regarding the multiple-punishment strand of double jeopardy.

Therefore, to gain an understanding of the ratifiers' intent regarding the multiple-punishment strand of Michigan's double jeopardy provision, it is appropriate to look to (a) how this Court's then-existing caselaw had addressed the topic, and (b) how that strand of the federal provision had been construed.

There was no Michigan caselaw addressing the multiple-punishment strand of double jeopardy at the time of the ratification of the 1963 Constitution. See *People v Robideau* 419 Mich 458, 481; 355 NW2d 592 (1984)(this Court notes that its first ruling addressing multiple punishment in a single proceeding was in 1976). Although it could be argued that, therefore, the state constitution does not contain an independent multiple-punishment component; the ratifiers also were seeking to mirror the federal double jeopardy provision, which did have a multiple-

punishment component. The ratifiers presumably intended to incorporate the federal protection on this point. Thus, we must turn for guidance on the meaning of the protection to cases interpreting and applying the federal provision.

B. The background to ratification of our state constitution: The roots of the multiple-punishment strand of double jeopardy under the U.S. Constitution, and creation of the *Blockburger* elements test.

The roots of the multiple-punishment strand of double jeopardy under the Fifth Amendment are traced to *Ex Parte Lange*, 85 US 163; 21 S Ct 872 (1873). In that case the defendant had been convicted of stealing bags of U.S. mail, a federal offense for which Congress had authorized punishment of up to a year in jail "or" a fine of $10-200. The defendant was sentenced to both a jail term **and** a fine, and the U.S. Supreme Court held that such double punishment was impermissible. This outcome is hardly surprising because, under the plain terms of the statute, the double sentences were expressly disallowed by the disjunctive "or". As such, no constitutional analysis of the punishments was really required. Yet the Court discussed at some length the historical prohibition on double punishment,

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.
>
> The principle finds expression in more than one form in the maxims of the common law. . . .
>
> In criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin '*Nemo bis punitur pro eodem delicto*', or as Coke has it, '*Nemo debet bis puniri pro uno delicto.*' No one can be twice punished for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.
>
> * * *
>
> The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether

> the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.
>
> Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense.
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> * * *
>
> These salutary principles of the common law have, to some extent, been embodied in the constitutions of the several States and of the United States. . . by Article V, that no person shall for the same offence be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property without due process of law.
>
> *Lange* 85 US at 168-170.

The Court concluded that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it", *Lange* 85 US at 173.

Although all this discussion could be viewed as dicta in light of the statute's express disallowance of the double penalties in that case, it has nonetheless formed the genesis of the multiple-punishment strand of double jeopardy. See *Pearce* 395 US at 717-718.

In *Lange* the defendant had been convicted under a single statute of a single offense, so there was no dispute or discussion about the meaning of "same offence" under the Double Jeopardy Clause. But the U.S. Supreme Court later made clear that "same offence" had a meaning beyond a single, identical offense.

In re Nielsen, 131 US 176; 9 S Ct 672; 33 L Ed 118 (1889), was a successive-prosecution case. In that case the defendant was first convicted of unlawful cohabitation under a federal polygamy law, and then he was convicted of a federal adultery offense (with his second wife). The issue was whether he was convicted twice of the "same offense". The Court noted that if the adultery was only a part and incident of the unlawful cohabitation, then the defendant could not be forced to go through the second trial. *Nielsen* 131 US at 185-186. In other words, if the adultery was a lesser-included offense of unlawful cohabitation, then trial on the greater offense would preclude subsequent trial on the lesser offense. In that case the government had conceded

that the cohabitation continued through the date of the alleged adultery, it involved the same woman, and the same witnesses had been used at the examination in both cases. See *Nielsen* 131 US at 186. The Court held that, in that context, they were the "same offense". *Nielsen* 131 US at 186-187. The Court stated that a conviction or acquittal on the greater crime was a bar to subsequent prosecution for a lesser one. *Nielsen* 131 US 189-190.

The U.S. Supreme Court later noted the fundamental principle that the legislative branch of government holds the power to define crime and ordain its punishment. *Burton v United States*, 202 US 344, 377-378; 26 S Ct 688; 50 L Ed 1057 (1906). The natural consequence of this principle is that, in assessing whether offenses are the "same" or separate, the proper focus is on legislative intent. *Morgan v Devine*, 237 US 632, 638-641; 35 S Ct 712; 59 L Ed 1153 (1915); *Albrecht v United States*, 273 US 1, 11; 47 S Ct 250; 71 L Ed 2d 505 (1927).

The Double Jeopardy Clause cannot limit the Legislature's power to direct separate punishment for each aspect of a criminal transaction. *Albrecht* 273 US at 11-12. In *Albrecht* the defendant argued that he was being doubly punished in violation of double jeopardy principles where he was convicted of illegally possessing liquor and of selling that same liquor. The U.S. Supreme Court rejected that argument, finding that Congress was free to authorize punishment for each aspect of the crime,

> The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.
>
> *Albrecht* 273 US at 11.

Thus, the Legislature is free to define separate crimes with substantial factual overlap. The multiple-punishment strand of double jeopardy merely protects against a defendant being subjected to more punishment than was intended by the Legislature.

In *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932), the Court stated the test to be used in assessing legislative intent. Where the defendant's act violates more than one statutory offense, offenses are not the "same" – and, thus, multiple punishments are permissible – if each offense requires proof of an additional fact that the other does not,

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.
>
> *Blockburger* 284 US at 304.

If, however, each does not contain an element not included in the other, i.e. one is necessarily included in (or subsumed by) the other, then the offenses are viewed as the "same". Applying that test, the Court held that the defendant could be convicted and sentenced for two Stamp Act offenses arising out of a single drug delivery – one offense under a provision disallowing sales not in original stamped packaging, and the other under a provision disallowing sales not pursuant to written order from the purchaser. *Blockburger* 284 US at 304. The Court held, "[a]pplying the test, we must conclude that here, although both sections were violated by one sale, two offenses were committed", *Id*. Each required proof of an element not required for the other.

The U.S. Supreme Court reaffirmed this principle in *Gore v United States*, 357 US 386; 78 S Ct 1280; 2 L Ed 2d 1405 (1958). Applying the *Blockburger* test, the Court held that the defendant could properly be consecutively sentenced for selling heroin without a written order, selling heroin not in its original stamped package, and selling heroin with knowledge that it had been unlawfully imported, all arising out of the same sales transactions. The Court concluded that, as in *Blockburger*, multiple punishments were intended by Congress. *Gore* 357 US at 388-391. The Court noted that nothing would have prevented Congress from rolling all the offenses together and prescribing one lengthy sentence equal to the consecutive sentences that had been

imposed, *Gore* 357 US at 392-393, and that the defendant's arguments rested on policy matters better left to Congress,

> In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility [citation omitted], these are peculiarly questions of legislative policy.
>
> *Gore* 357 US at 393.

Thus, the U.S. Supreme Court recognized that its role was not to encroach on the Legislature's turf by defining crimes or setting parameters for punishment. Its role was to determine legislative intent and carry out the will of the Legislature.

This was the status of the federal double jeopardy multiple-punishment protection at the time of the ratification of our Michigan constitution. A defendant could not be twice punished for the "same offense"[3], and "same" offense was not limited to literally the identical offense. In assessing whether offenses were the "same", the proper focus was recognized to be legislative intent. The Legislature was free to define and fix punishment for separate crimes, even when the elements of the offenses overlapped. In assessing whether offenses were intended to be the "same", the U.S. Supreme Court applied *Blockburger* as the standard.

Under the federal Double Jeopardy Clause, in the context of multiple-punishment analysis, *Blockburger* is a means to an end, not an end in itself. The test is a tool to divine legislative intent. As applied, it is not a constitutional commandment of sameness.

In this respect *Blockburger* has a very different meaning in a multiple-punishment

[3] Later the U.S. Supreme Court held that, because legislative intent lied at the heart of the inquiry, even if offenses are the "same" under *Blockburger*, the Legislature may authorize multiple punishments. *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983).

context than it has in a successive-prosecution context. In successive-prosecution cases, it is the definitive test to determine whether prosecutions comply with double jeopardy principles – if each offense contains an element not included in the other, successive prosecutions of the offenses are permissible; if each does not contain a separate element, successive prosecution is barred, period. See *Nutt* 469 Mich at 576.[4] In that context, the test incorporates the special concerns and interests applicable to successive prosecutions, namely the historical protection against being made to suffer the anxiety and uncertainty of running the gauntlet a second time. Those concerns are, of course, not implicated in a single-trial setting. See *Robideau* 419 Mich at 484-485. The U.S. Supreme Court recognized that application of such a rigid commandment in a single-trial, multiple-punishment context would improperly hamstring the Legislature, which has sole power to define crime and set parameters for punishment. The Legislature may, for example, define one crime as necessarily included in a greater crime and still express a desire that separate punishments be imposed. In a single-trial context this would not run afoul of double jeopardy. In a single-trial, multiple-punishment context, the federal Double Jeopardy Clause only assures that the court does not exceed its legislative authorization, see *Brown v Ohio*, 431 US 161, 165; 97 S Ct 2221; 53 L Ed 2d 187 (1977)(citing *Gore*, *supra*; *Lange, supra*).

Later cases from the U.S. Supreme Court[5] reaffirmed that legislative intent rested at the

[4] As stated in Dressler, *Understanding Criminal Procedure* 3d ed (2002), p 727, "Essentially, the *Blockburger* 'same offense' test is a constitutional principle as it relates to multiple *prosecutions*; on the matter of cumulative punishments as part of a single prosecution, however, *Blockburger* is a rule of statutory construction."

[5] In adopting the U.S. provision into our state constitution, the ratifiers implicitly expressed a desire that the U.S. provision, as it then existed, i.e. as it had been interpreted, be the law in Michigan. Rulings from the U.S. Supreme Court after ratification of the Michigan constitution in 1963 are, of course, not binding on this Court in its interpretation of the state constitution. However, they can offer some guidance on the meaning of our parallel double jeopardy provision.

heart of multiple-punishment analysis, that the protection serves as no constraint on the Legislature, and that *Blockburger* was a tool of statutory construction used to that end. *Ianelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975); *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983); *Brown* 431 US at 165; see also *Wayne Prosecutor v Recorders Court Judge*, 406 Mich 374, 391-392 & 392-394; 280 NW2d 793 (1979)(this federal double jeopardy protection restrains courts and prosecutors not the Legislature, which retains power to define crimes and fix punishments).

C. Under the Michigan Constitution, *Blockburger* is a means to an end – a tool to assess legislative intent. It is not a constitutional imperative under the Michigan Constitution.

At the time our state constitution was ratified, *Blockburger* was not a constitutional commandment in the multiple-punishment context. Rather, the multiple-punishment strand of federal double jeopardy, which the ratifiers of the Michigan constitution intended to mirror, had been construed by reference to legislative intent. The true standard for multiple-punishment claims was whether the Legislature intended offenses to be the "same", i.e. to allow multiple punishments. Under this analysis, the U.S. Supreme Court had held that subsumed lesser-included offenses were the "same" as their greater offenses, *Blockburger*.

In ratifying our state constitution, the people sought to incorporate the constitutional protections provided by the double jeopardy provision of the federal constitution. *Nutt* 469 Mich at 588-591. Thus, the multiple-punishment component of our state double jeopardy provision also focuses on legislative intent, guaranteeing that a defendant not be subject to more punishment than was intended by the Legislature.

However, because *Blockburger* is merely a tool to assess legislative intent and is not itself of constitutional dimension in multiple-punishment cases, it is not incorporated into our

state double jeopardy provision. There is no indication that the ratifiers of the Michigan constitution sought not only to mirror the federal constitutional law on the issue, but also sought to go further and engraft into the Michigan constitution rules of statutory construction that had been used by the U.S. Supreme Court in applying the constitutional principle.

It is important to bear in mind that, in the U.S. Supreme Court cases discussed in the preceding section of this brief predating ratification of our state constitution, the Court was assessing federal statutes and the intent of Congress in enacting them. State offenses were not at issue. Interpretation of state statutes and the intent behind them had been recognized to be a matter of state law for state courts. *Garner v Louisiana*, 368 US 157, 166; 82 S Ct 248; 7 L Ed 2d 207 (1961)(Court notes it is bound by a state court's interpretation of its own statutes).[6] As such, the means by which state legislative intent is assessed is a matter for this Court to decide. No particular tool is commanded by the state constitution. This Court's jurisprudence has focused on legislative intent and, while occasionally using *Blockburger* as a tool in that inquiry, has properly recognized that *Blockburger* is only one tool among many in assessing legislative intent.

D. Michigan's Multiple Punishment Cases, and the *Robideau* test.

The first Michigan case addressing multiple-punishment in a single proceeding was *People v Martin*, 398 Mich 303; 247 NW2d 303 (1976). In *Martin* this Court held that the defendant could not be convicted of both possessing heroin and delivering the same heroin.

[6] Subsequently, the U.S. Supreme Court reiterated that determinations of state legislative intent in multiple-punishment cases are exclusively the province of state courts. *Brown v Ohio*, 431 US 161, 167; 97 S Ct 2221, 2226; 53 L Ed 2d 187 (1977); *Whalen v United States*, 445 US 684, 688-689; 100 S Ct 1432, 1435; 63 L Ed 2d 715 (1980); *Illinois v Vitale*, 447 US 410, 416; 100 S Ct 2260, 2265; 65 L Ed 2d (1980); *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673, 679; 74 L Ed 2d 535 (1983).

Although this Court did not cite *Blockburger*, the analysis used by the Court mirrors the *Blockburger* test. This Court noted that possession was a lesser-included offense of the delivery, and that the jury could not have convicted the defendant of the delivery without finding that he possessed the heroin,

> Defendant may not be "doubly punished" by convicting him of possession, which in this case was a necessary incident to the very delivery for which he was also convicted.
>
> A defendant may be charged and tried for each act that constitutes a separate crime. However, when tried for an act which includes lesser offenses, if the jury finds guilt of the greater, the defendant may not also be convicted separately of the lesser included offense. . . .
>
> The guarantee against double jeopardy protects against not only a second *prosecution* for the same offense, but it also "protects against multiple punishments for the same offense". *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969).
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> * * *
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> > "It is clear that preventing multiple punishment for the same offense was foremost in the minds of the framers of the double jeopardy clause. * * * Until joinder became permissible and commonplace, however, multiple punishment could only come from multiple trials." Comment, *Twice in Jeopardy*, 75 Yale L J 262, 266, fn 13 (1965).
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> In *O'Clair v United States*, 470 F2d 1199, 1203 (CA1, 1972), *cert den*, 412 US 921; 93 S Ct 2741; 37 L Ed 2d 148 (1973), defendant was convicted at a single trial of bank robbery and assault while committing the robbery. The Court of Appeals, relying on both statutory interpretation and double jeopardy analysis, held that the statute permitted only one conviction for a single bank robbery. The conviction and sentence for the lesser included offense were vacated. Addressing the double jeopardy argument, the Court stated:
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> > "It would seem apparent that if the state cannot constitutionally obtain two convictions for the same act at two separate trials, it cannot do so at the same trial."
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> *Martin*, 398 Mich 309-310 (emphasis in original).

See also *People v Stewart (On Rehrg)*, 400 Mich 540; 256 NW2d 31 (1977).

The offenses at issue in *Martin* would not have passed the *Blockburger* test. Possession of heroin does not include any element not also included in the delivery offense. Under *Martin*

(or *Blockburger*), a defendant cannot be punished for both a greater offense and a true necessarily-included lesser offense.

However, where one offense is not completely subsumed in the other, multiple punishment is permissible. In *Wayne Prosecutor v Recorders Court Judge*, 406 Mich 374; 280 NW2d 793 (1979), the issue was whether a defendant could be convicted of felony-firearm along with the predicate felony (murder).[7] This Court noted that, using *Blockburger* as a means of assessing legislative intent, multiple punishments were permissible. *Wayne Prosecutor* 406 Mich at 395-396. In response to the argument that *Blockburger* should be the controlling test, this Court expressed doubts about whether *Blockburger* was a constitutional test. *Wayne Prosecutor* 406 Mich at 394-395. This Court noted that the U.S. Supreme Court had stated that *Blockburger* served the function of identifying legislative intent. *Wayne Prosecutor* 406 Mich at 395. But this Court declined to resolve the issue because *Blockburger* was satisfied in that case, *Wayne Pros* 406 Mich at 395.

This Court noted that, under *Blockburger*, the focus was the abstract legal elements of the offenses, not the particular factual occurrence given rise to the charges, *Wayne Pros* 406 Mich at 395. This Court held that the statutory elements of felony-firearm and of the predicate murder were different, and therefore multiple punishment was allowable under *Blockburger*. *Wayne Prosecutor* 406 Mich at 396. Neither a killing nor malice was necessary to felony-firearm, and conversely possession of a firearm was not necessary to second degree murder. *Wayne Pros* 406 Mich at 396-397. Further, this Court held that, although in that case the prosecutor relied on

[7] Reflecting an oddity inherent in lesser-offense double jeopardy analysis, the defense argument in *Wayne Prosecutor* was, in essence, that murder (punishable by up to life) was a lesser included offense of the felony-firearm offense (a 2-year felony) because proof of that felony was necessary to show the felony-firearm offense.

proofs of the murder to secure the felony-firearm conviction, legally it was not required to do so, any felony would do. *Wayne Prosecutor*, 406 Mich at 397-398. A "substantial overlap" of proofs was permissible. *Wayne Prosecutor* 406 Mich at 396 & 397 & 398. The Court also noted that the felony-firearm statute made clear a legislative intent to allow multiple punishment in its statement that the sentence for felony-firearm was to be served consecutively to that imposed for the accompanying felony. *Wayne Prosecutor* 406 Mich at 402.

In the next three multiple-punishment cases to come before the Court (in fairly rapid succession), the Court largely ignored *Blockburger* and veered off to look to the facts of the particular case rather than the abstract statutory elements in assessing whether multiple punishments were permissible, construing the Michigan double jeopardy provision as providing broader protections than the federal provision.

In *People v Jankowski*, 408 Mich 79; 289 NW2d 674 (1980), the Court held that under the Michigan constitution armed robbery, larceny over $100, and larceny of a building, all of which arose from a single taking of property, constituted the "same" offense and could not support multiple punishment. The Court reached this conclusion even though each of the offenses included an element not included in the others and, thus, would have satisfied the *Blockburger* test. In fact, the Court did not even cite to *Blockburger*. The Court stated that the standard to be applied was whether the convictions were factually based on proof of a single act. *Jankowski* 408 Mich at 86. Under that standard, the larceny offenses were lesser-included offenses of the robbery "[o]n the evidence produced at trial", *Jankowski* 408 Mich at 86-87. And the defendant could not be convicted of both a greater and lesser included offense, citing *Martin*. *Jankowski* 408 Mich at 90-91. The Court made clear that its analysis turned on the facts of the case,

> It is upon the facts of this case however, not one abstractly hypothesized, that the defendant is threatened with multiple punishment.
>
> For purposes of the double jeopardy analysis, as a matter of state constitutional law, the question is not whether the challenged lesser offense is by definition necessarily included within the greater offense also charged, but whether, on the facts of the case at issue, it is.
>
> *Jankowski* 408 Mich at 91.

Thus, this Court found that only one offense, one single criminal act, had been committed. *Jankowski* 408 Mich at 92.

People v Wilder, 411 Mich 328; 308 NW2d 112 (1981), was argued the same day as *Jankowski*. In *Wilder*, the Court held that a defendant could not be punished for both felony-murder and the predicate felony (robbery), which the Court characterized as a lesser-included offense. *Wilder* 411 Mich at 342. The Court stated that the standard was whether the proofs at trial showed that one offense was a necessarily or cognate lesser of the other, and, if so, then conviction of both was precluded. *Wilder* 411 Mich at 343-345. The Court noted that the predicate felony could be characterized as a cognate offense, and that the elements of felony-murder do not in every instance require a robbery, *Wilder* 411 Mich at 345, but found that point irrelevant because the analysis turned not on the theoretical elements of the offense but the proofs actually adduced [citing *Jankowski*], *Wilder* 411 Mich at 345-346. Under the facts of the case, robbery was necessarily included in the felony-murder,

> In this case, proof required to convict of first-degree felony murder necessarily included first proving culpability as to the underlying felony. . .
>
> The fact implicit in the double-jeopardy lesser included offense analysis is that the greater crime of first-degree felony murder cannot have been committed without necessarily committing the underlying felony element of armed robbery. Defendant Wilder and codefendant Butts must necessarily have been found guilty of armed robbery or attempted armed robbery before any conviction of first-degree felony murder could arise incident to the robbery.
>
> *Wilder* 411 Mich at 346.

The Court claimed that its decision was consistent with U.S. Supreme Court authority, *Wilder* at 348-349, but asserted that the Michigan Constitution had been construed as conveying broader protections than the U.S. Constitution in multiple-punishment cases,

> Some confusion may exist over the use of various tests to establish a double jeopardy violation in Federal and state courts. Basically, there are few significant variances between the Federal test and our own. However, some differences do exist and should be noted.
>
> * * *
>
> [T]he test concerning multiple punishment under our constitution has developed into a broader protective rule than that employed in the Federal courts. Under Federal authority, the Supreme Court established the "required evidence" test enunciated in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932) See also its original expression in *Morey v Commonwealth*, 108 Mass 433 (1871). In *Blockburger*, the Court outlined their test:
>
> > "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 US 304.
>
> This approach isolates the elements of the offense as opposed to the actual proof of facts adduced at trial. See *Harris v United States*, 359 US 19, 23; 79 S Ct 560; 3 L Ed 2d 597 (1959); *United States v Kramer*, 289 F2d 909, 913 (CA2, 1961), Under this test, convictions of two criminal offenses arising from the same act are prohibited only when the greater offense necessarily includes all elements of the lesser offense. Accordingly, conviction of both offenses is precluded only where it is impossible to commit the greater offense without first having committed the lesser offense. From the perspective of lesser included offenses, the Supreme Court in cases concerning double jeopardy has thus adhered to the common-law definition of such offenses. See *People v Ora Jones*, 387.
>
> The Federal test in *Blockburger*, can thus be distinguished from this Court's approach in two principal ways. First, we find the proper focus of double jeopardy inquiry in this area to be the proof of facts adduced at trial rather than the theoretical elements of the offense alone. Proof of facts includes the elements of the offense as an object of proof. Yet, the actual evidence presented may also determine the propriety of finding a double jeopardy violation in any particular case. See *People v Martin*, 309; *People v Stewart*, 548; *People v Jankowski*, 91.
>
> Second, we have held that double jeopardy claims under our constitution may prohibit multiple convictions involving cognate as well as necessarily included offenses. *People v Jankowski*, 91.
>
> *Wilder* at 348-349 n 10.

In *People v Carter*, 415 Mich 558; 330 NW2d 314 (1982), the Court held that a defendant could be convicted of both aiding and abetting extortion and conspiracy to commit the same crime. Assessing the issue under the U.S. Constitution, the Court noted that the offenses passed the *Blockburger* abstract statutory elements test. *Carter* 415 Mich at 578-582. The Court then turned to the "broader" protections provided by the Michigan double jeopardy standard, which employed a fact-based analysis and included not only necessarily included lesser offenses but also cognate offenses. *Carter* 415 Mich at 582-584. The Court concluded that the offenses were not the "same".

The analysis and result in *Jankowski* and *Wilder* (as well as much of the analysis in *Carter*) should be viewed as flawed in several respects. First, as discussed at the outset of this Brief, the double jeopardy clause of the Michigan constitution should not be construed as affording broader protections than the federal provision. Second – to briefly jump out of our chronological discussion of caselaw – the lesser-offense standard utilized in *Jankowski*, *Wilder*, and *Carter* can no longer be reconciled with the law on lesser-included offenses in Michigan stated in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002) – a point more fully discussed *infra* in Issue II. Third, in light of *Nutt*, the holding in *Jankowski* and *Wilder* would lead to the anomolous result that offenses that could be prosecuted in successive trials under *Blockburger*, could not be prosecuted in a single trial under the Michigan constitution.

The reasoning used in *Jankowski*, *Wilder*, and *Carter* proved to be short lived. In fact Justice Ryan's concurring opinion in *Wilder* foreshadowed a shift in things to come. Justice Ryan noted that traditional lesser-offense analysis was not a good fit for predicate-based

offenses. *Wilder* 411 Mich at 360 (Ryan, J, con).[8] Felony-murder is defined by reference to a class of predicate offenses, and proof of a predicate is a prerequisite for proof of felony-murder. *Wilder* 411 Mich at 359-360 (Ryan, J, con). But, Justice Ryan stated, that does not mean the two offenses are greater and lesser-included offenses in the traditional sense, which is a concept reflecting a continuum of culpability. *Wilder* 411 Mich at 360 (Ryan, J, con). Greater and lesser-included offenses on the same continuum protect the same societal interest. *Wilder* 411 Mich at 360 (Ryan, J, con). Such offenses are tied together by "logic", but predicate-based offenses are tied together by the Legislature and bear no intrinsic connection. *Wilder* 411 Mich at 360 (Ryan, J, con). If a defendant commits offenses on the same continuum, there is an implicit assumption that the Legislature did not intend to allow multiple punishment because conviction of one offense on the continuum vindicates the societal interest. *Wilder* 411 Mich at 360-361 (Ryan, J, con). But that same assumption cannot be made where the offenses are not on a continuum of culpability, where the link is merely the Legislature's definition of a crime by reference to another offense or class of offenses. *Wilder* 411 Mich at 361 (Ryan, J, con). Justice Ryan expressed the view that no inference of legislative intent against multiple punishment should arise in predicate offense cases, *Wilder* 411 Mich at 361 (Ryan, J, con). The Legislature's choice to define an offense in terms of another independently defined offense or set of offenses does not express a judgment that a defendant should not be doubly punished, *Wilder* 411 Mich at 363 (Ryan, J, con).[9]

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[8] This point had earlier been made by Chief Justice Rehnquist in *Whalen v United States*, 445 US 684; 100 S Ct 1432, 1446-1447; 63 L Ed 2d 715 (1980)(Rehnquist, C.J., dis).

[9] Justice Ryan, nonetheless was of the view that, although murder and robbery involve violations of distinct social norms, which raised an inference that the Legislature intended to allow multiple punishment, such an inference did not equate with the sort of clear legislative intent required to override the rule of lenity. *Wilder* 411 Mich at 364-365.

Justice Ryan's criticism of the majority's fact-based analysis soon gained the support of a majority of the Court. Justice Ryan wrote the opinion for the Court in *People v Wakeford*, 418 Mich 95; 341 NW2d 68 (1983). *Wakeford* addressed the question of how many counts of armed robbery could arise from the defendant's hold-up of a grocery store. The Court noted that the *Blockburger* test had no bearing on the issue of multiple punishments under a single criminal statute. *Wakeford* 418 Mich at 106-108. In discussing whether the Legislature intended multiple punishment, the Court stated that its prior cases had overly focused on the fact that the defendant committed a single act. The Court noted that the fact that the same evidence was used to convict of multiple counts was not the standard for double jeopardy, it was whether the legislative intent or statutory purpose was that two convictions result. *Wakeford* 418 Mich at 110-111. The Court disavowed prior cases on that point,

> [D]efendant's claim of factual double jeopardy depends not upon whether most or all of the same evidence was utilized to convict of both counts of armed robbery, but whether the legislative intent or statutory purpose was that two convictions should result. To the extent certain language in *Martin*, *Stewart*, and *Jankowski* suggests that the critical test is whether the defendant committed "one single, wrongful act", we specifically disavow that test. It is up to the Legislature, not this Court, to determine what constitutes a single offense. The so-called "factual double jeopardy" doctrine simply asks whether the Legislature authorized multiple punishment under the circumstances.
>
> *Wakeford*, 418 Mich at 110-111.

The Court held that convictions for robbing multiple persons at a single location were permissible, noting that any perceived harshness in the rule was modulated by the legislatively expressed policy of concurrent sentencing. *Wakeford*, 418 Mich at 111-113.

This Court's next pronouncement on multiple-punishment was *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984). There, this Court held that a defendant could, consistent with double jeopardy principles, be convicted of first degree criminal sexual conduct based on a penetration under circumstances involving an "other felony", and also be convicted of the

predicate "other felony" (armed robbery or kidnapping in that case). *Robideau* 419 Mich at 488-490.

This Court started its discussion with a review of federal law on the topic. The Court noted that the Double Jeopardy Clause acted as a restraint on the prosecutor and the courts, not the Legislature; and prohibited only more punishment than was intended by the Legislature. *Robideau* 419 Mich at 469. The ultimate power to define crimes and determine punishment rests with the Legislature, so the double jeopardy question is one of legislative intent. *Robideau* 419 Mich at 469. This Court noted that, as an aid to determining legislative intent, the U.S. Supreme Court had created the *Blockburger* test. *Robideau* 419 Mich at 470. If one offense is a necessarily-included lesser offense of the other, the *Blockburger* test will always raise the presumption that they are the "same offense", because the lesser offense will never have an element not required by the greater offense. *Robideau* 419 Mich at 471.

This Court stated (reminiscent of Justice Ryan's concurrence in *Wilder*) that predicate-based offenses, which do not have a traditional lesser-greater relationship, do not neatly fit within traditional lesser-offense analysis. In *Robideau*, the compound crime of first degree CSC required proof of penetration during the commission of "any other felony", which is the predicate crime. *Robideau* 419 Mich at 471. This Court noted two different approaches to applying *Blockburger*: elements-based, and fact specific. *Robideau* 419 Mich at 471-472. Under the elements approach, the two offenses are separate crimes under *Blockburger*, because first degree CSC requires penetration, which is not required for robbery or kidnapping; and conversely armed robbery requires an armed taking and kidnapping requires movement or confinement, elements that "are not, in a strict sense, *required*" for the crime of first degree CSC because "[a]ny felony will do". *Robideau* 419 Mich at 471. Under a fact-specific approach,

however, if one looks to how the charged crimes were actually proved, the compound crime and the predicate would not be separate offenses under *Blockburger*. *Robideau* 419 Mich at 471-472. Looking to the facts of the case instead of at the statutes in the abstract, the prosecutor had to prove the predicate to establish the compound crime and they are presumptively the same offense. *Robideau* 419 Mich at 472.

This Court noted that the U.S. Supreme Court generally had used an elements-based approach, *Robideau*, 419 Mich at 473-480.

Looking to Michigan caselaw, this Court noted that its own experience dealing with multiple punishment cases had been "rocky", discussing its prior cases. *Robideau* 419 Mich at 480-484. This Court indicated that it had imported fact-specific analysis from successive prosecution cases in Michigan, *Robideau* 419 Mich at 480-482, and attempted to explain and rationalize prior caselaw by asserting that much of the confusion in Michigan law on the topic resulted from the failure to distinguish between successive-prosecution and multiple-punishment cases. *Robideau* 419 Mich at 484. Successive-prosecution cases involve the core values of the Double Jeopardy Clause – protecting an individual from having to twice run the gauntlet, suffer the embarrassment, expense, and ordeal, and having a continuing state of anxiety/insecurity. *Robideau* 419 Mich at 484. To protect against the harm of successive prosecutions, the Court had adopted a transactional approach, providing broader protections under the Michigan Constitution. *Robideau* 419 Mich at 485.[10] But the multiple-punishment prong of double jeopardy addressed different interests, the right to be free from vexatious proceedings was not implicated, and the only interest the defendant has is not having more punishment imposed than

[10] The same transaction test has since been abandoned. *Nutt, supra*.

intended by the Legislature. *Robideau*, 419 Mich at 485. Legislative intent was, therefore, determinative. *Robideau* 419 Mich at 485.

The Court rejected its prior cases indicating that the proper focus was the facts of the case. The Court does not "sit as a superlegislature, instructing the Legislature on what it can make separate crimes", *Robideau,* 419 Mich at 485. This Court recognized that some of its fact-based multiple-punishment opinions had had the unacceptable effect of "creating areas in which arguably the Legislature cannot now act". *Robideau* 419 Mich at 485. So this Court disavowed those prior rulings. *Robideau* 419 Mich at 485. The only question is what did the Legislature intend. *Robideau* 419 Mich at 485.

In *Robideau* this Court rejected *Blockburger* as a tool to assess legislative intent, finding it not particularly helpful, especially where predicate/compound offenses are involved,

> As a means of determining that end, we find the *Blockburger* test to have questionable status in the Supreme Court of the United States and find the propriety of its use in any case to be questionable. When applied in the abstract to the statutory elements of an offense, it merely serves to identify true lesser included offenses. While it may be true that the Legislature ordinarily does not intend multiple punishments when one crime is completely subsumed in another, *Blockburger* itself is of no aid in making the ultimate determination. Although its creation of a presumption may make a court's task easier, it may also induce a court to avoid difficult questions of legislative intent in favor of the wooden application of a simplistic test.
>
> Because *Blockburger* was developed to deal with situations where an identifiable single act falls under the coverage of two statutes, it is even less helpful when applied to a compound crime. In these crimes, the Legislature has intentionally converted what would normally be two discrete acts into one legislatively created "act".
>
> The difficulties with the *Blockburger*, test lead us to the conclusion that it should be abandoned. The United States Supreme Court has declared that it is but a test of statutory construction and not a principle of constitutional law. *Missouri v Hunter, supra*. Indeed, it would be contrary to established principles of federalism for the United States Supreme Court to impose on the states the method by which they must interpret the actions of their own legislatures. We, therefore, find it within our power to reject the *Blockburger* test, preferring instead to use traditional means to determine the intent of the Legislature: the subject, language, and history of the statutes.

Robideau 419 Mich at 485-486.

This Court stated some "general principles" to be used when assessing legislative intent. *Robideau* 419 Mich at 487-488:

- Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. But where the two statutes serve the same social norm, the Legislature generally did not intend multiple punishments (e.g. larceny in a building and larceny over $100).

- The amount of punishment authorized by the Legislature can indicate legislative intent. Where statutes build on one another, incorporating most elements of a base statute and increasing the penalty, the Legislature has decided that aggravated conduct deserves harsher punishment compared to the base statute, and did not intend punishment under both.

This is a nonexclusive list of sources for legislative intent. *Robideau* 419 Mich at 488. The Court indicated that, if there is no conclusive evidence of legislative intent, the rule of lenity compels the conclusion that multiple punishments were not intended. *Robideau* 419 Mich at 488.

Looking to the issue before it, this Court found a legislative intent to allow multiple punishment for first degree CSC based on a penetration under circumstances involving an "other felony", and also for the "other felony" (armed robbery or kidnapping in that case). *Robideau* 419 Mich at 488-490. The court noted that the predicate and the compound offenses served distinct societal interests, which suggested an intent to allow multiple punishments. *Robideau* 419 Mich at 488. The predicates and the compound offense each carried maximum sentences of up to life imprisonment, which "very strongly suggests" that separate punishments be allowed, *Robideau* 419 Mich at 488-489, because if the predicate crime is considered subsumed, it results in no greater punishment. *Robideau* 419 Mich at 489-490.[11] The Legislature could not intend

[11] On the latter point regarding penalty, this Court attempted to distinguish the result from that reached in *Wilder*, stating that the punishments for felony-murder and the predicate indicated that multiple punishments were not intended,

(footnote continued on next page)

that someone committing the predicate could go on and commit the compound with no risk of either a second conviction or an enhanced penalty, so separate punishment must have been intended. *Robideau* 419 Mich at 490.

After *Robideau* this Court faced another case involving felony-murder and the predicate felony. *People v Harding*, 443 Mich 693; 506 NW2d 482 (1993). However, *Harding* was a successive-prosecution case, and this Court at the time was employing the broader same-transaction test in successive prosecution cases, see *People v Sturgis*, 427 Mich 392, 401-402; 397 NW2d 783 (1986). In *Harding* the prosecution tried the defendant for felony-murder after the victim died as a result of injuries suffered in an attack for which the defendant had earlier been convicted of robbing and assaulting the victim. With regard to the successive-prosecution

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> This analysis is consistent with the result reached in *People v Wilder*, prohibiting dual convictions of first-degree felony murder and the predicate felony. Since felony murder is punishable by a mandatory life sentence, while the predicate felonies are punishable by no more than a term of years up to life, it may be inferred that the Legislature intended to punish a defendant only once for committing both crimes. While someone in the process of committing a predicate felony has a real disincentive to commit murder (mandatory life) even absent the threat of dual convictions, the same person, assuming the predicate felony carries and up-to-life maximum penalty, would have no such disincentive to commit criminal sexual conduct *unless* dual convictions are imposed.
>
> *Robideau* 419 Mich at 489 n 8.

The People submit that this attempt to explain away an inconsistency with *Wilder* was unnecessary in light of the Court's rejection of the fact-specific analysis employed in *Wilder*.

Moreover, the People submit that the result in *Wilder* was simply wrong and that the distinction the *Robideau* court sought to draw is, in fact, of little significance. It cannot reasonably be said that a defendant who would not be dissuaded from committing an offense because it was punishable by up to life imprisonment would be dissuaded if it were punishable by a mandatory life sentence. The reason the predicate does not increase the penalty in that scenario is because there is no greater sentence than life, not because the Legislature has made a choice for it to have no sentencing consequences. See *People v Harding*, 443 Mich 693, 730 & n 23; 506 NW2d 482 (1993)(Riley, J., con/dis).

aspect of the analysis, this Court recognized that an exception had been carved out by the U.S. Supreme Court for cases where the facts necessary to the later conviction had not yet arisen at the time of the first trial, and held that the exception also applied in Michigan. *Harding* 443 Mich at 701-705 & 721.

In *Harding*, five justices signed on to Justice Brickley's opinion addressing a multiple-punishment aspect of the case.[12] *Harding* 443 Mich at 705-714 & 735. They concluded that the Legislature did not intend to allow multiple punishments for felony-murder and armed robbery, because the penalties for the offenses were not the same. *Harding* 443 Mich at 709-712 & 735. Those justices also rejected the idea that the felony-murder and the predicate robbery served different societal norms,

> [F]elony murder has as its objective punishment for one who commits a murder in the course of committing a felony. The societal norm could not be more clear – felony murder is second-degree murder that has been elevated to first-degree by the fact that it was committed during the commission of a felony. The felony in this case is the robbery and it was a sine qua non of the felony murder.
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> *Harding*, 443 Mich at 710 n 18 (Brickley, J.) & 735 (Cavanagh, J., con/dis).

Thus, the Court held that the defendant could not be punished for both the felony-murder and the predicate robbery. *Harding*, 443 Mich at 712 & 735. The Court also held that the assault was a lesser-included offense of the murder. *Harding*, 443 Mich at 714 & 735. The Court vacated the robbery and assault convictions, and directed that Defendant be given credit against his murder sentence for time served on the prior case. *Harding* 443 Mich at 720 & 735.

Justice Riley wrote a separate opinion partially dissenting, in which Justice Boyle joined.

[12] See footnote 28, *infra*, for a brief discussion of cases involving both successive-punishment and multiple-prosecution.

Justice Riley expressed the view that multiple punishment for robbery and felony-murder was allowable. *Harding* 443 Mich at 727-734. Justice Riley deduced that the Legislature intended to allow punishment for felony-murder and robbery,

> In the instant case, the Legislature intended to punish defendant for both felony murder and armed robbery. As explained by the majority, the intent of the Michigan Legislature may be determined through traditional means, including "the subject, language, and history of the statutes." *People v Robideau*, 419 Mich 458, 486; 355 NW2d 592 (1984). Citing *Robideau*, the majority concludes that because the armed robbery statute permits punishment ranging from any term of years to life, while felony murder is mandatory life imprisonment, the Legislature intended punishment for felony murder subsume punishment for armed robbery. The majority, however, incorrectly dismisses the maximum punishment authorized for armed robbery: life imprisonment. Utilizing its own analysis, the majority should find that the Legislature intended separate punishment for each offense at issue because each may be punished by life imprisonment.
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> Moreover, this Court has also noted that when statutes are directed at "distinct social purposes" or "distinct evils" multiple punishment was intended by the Legislature. *Sturgis, supra* at 408, 409. An examination of the elements of the offenses reveal that the social interests in punishing armed robbery are distinct from punishing first-degree murder. The elements of first-degree murder include: (1) malice, (2) homicide, and (3) either premeditation or homicide accompanied by an enumerated felony. MCL 750.316[]. In other words, first-degree murder is common-law murder "plus one or more of the aggravating circumstances mentioned" *People v Carter*, 395 Mich 434, 438; 236 NW2d 500 (1975), quoting Perkins, Criminal Law (2d ed), p 90. Hence, the focus of the offense is murder.
>
> On the other hand, the elements of armed robbery include: (1) an assault, (2) a felonious taking of property from the victim's presence or person, and (3) a perpetrator armed with a weapon. MCL 750.529[]. In other words, "[r]obbery is committed only when there is larceny from the person, with the additional element of violence or intimidation." *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975). Hence, the offense "is aimed at persons who violate social norms by taking property from the presence of another by force or threat of force while armed with a weapon." *People v Witt*, 140 Mich App 365, 371; 364 NW2d 692 (1985).
>
> Thus, first-degree murder focuses upon homicide, armed robbery upon the violent deprivation of property. The first-degree murder statute does not punish the taking of property except when accompanied by a homicide. Nor does the armed robbery statute punish homicide. The societal interests are independent. In fact, the societal interests targeted by the felony murder provision of the first-degree murder statute generally are distinct from the underlying felonies. Felony murder is designed to punish homicide committed in the course of aggravating circumstances, while the societal interests undergirding the enumerated felonies are independent and also important to maintain. That the societal interests in

prohibiting rape and kidnapping, for instance, are distinct from those prohibiting murder cannot be doubted. In a parallel fashion, the societal interests served by armed robbery and the first-degree murder statutes are distinct.

This is especially true in Michigan where felony murder requires malice. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). The societal interest in prohibiting first-degree murder is not only homicide, but one committed with malice. *Id*. Armed robbery, of course, does not possess such a requirement. "[T]he presence of the different intent elements indicates that the Legislature intended to prevent distinct types of harm, robbery and corporeal harm," as well as intended to address separate social ills. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986)(holding that multiple punishments were intended with regard to assault with intent to do great bodily harm and assault with intent to rob and steal while armed). See also *People v Leach*, 114 Mich App 732, 735-736; 319 NW2d 652 (1982)(holding that multiple punishments were intended with regard to armed robbery and assault with intent to commit great bodily harm). The Legislature carefully crafted distinct offenses defending separate societal interests that defendants violated. Punishment for each offense was intended by the Legislature.

Moreover, in *Wakeford, supra* at 105, n 7, this Court recognized the impropriety of the majority's conclusion:

> We have never held, as a matter of state or federal constitutional law, that only one conviction may result, for example, from the rape, robbery, kidnapping, and murder of victim A. . . even if the charges must be brought in a single trial under the "same transaction" test. Such a rule could be said to permit criminals to engage in an extended crime "spree," knowing that at most only one conviction could result and that any crime other than the most serious was "free" of any possibility of conviction. It would offend rationality, as well as our sense of equal justice, to require treatment of one defendant committing a single crime identically with another defendant committing four counts of the same crime in the "same transaction."

Indeed, the majority's dismissal of the armed robbery conviction in the instant case presents the exact danger of which the Court forewarned in *Wakeford*.

Harding at 729-734 (Riley, J., con/dis)

In *People v Colvin*, 467 Mich 944; 655 NW2d 764 (2003), this Court peremptorily reversed the defendant's predicate armed robbery conviction in a felony-murder case, on the authority of *Wilder*.[13]

[13] In November 2004, this Court granted leave to appeal to address multiple-punishment in the context of convictions for felony-murder and the predicate felony, *People v Curvan*, 471 Mich *(footnote continued on next page)*

In *Nutt, supra* 469 Mich 565, this Court held that *Blockburger* was the controlling test under the Michigan constitution for successive-prosecution cases. But, in so holding, the Court made clear that it was not addressing the meaning of the term "same offense" as it applies to the multiple-punishment strand of double jeopardy. *Nutt* 469 Mich at 575 n 11 & 595 n 30.

E. *Robideau*, for the most part, reflects the proper test for multiple-punishment claims under the Michigan constitution; however, examination of the elements of the offenses, à la *Blockburger*, should be incorporated into that test as a means of assessing legislative intent.

The People submit that the Court's analysis in *Robideau* is largely sound and states the proper test for assessing legislative intent under the multiple-punishment strand of our state double jeopardy provision.[14] In particular, the Court's focus on the societal interest(s) being served by the statutes should be viewed as a key component in assessing whether the Legislature

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914; 688 NW2d 509 (2004); but, after briefing and oral argument, this Court vacated the leave grant "because the Supreme Court is no longer persuaded that the questions presented should be reviewed by this Court", 473 Mich 896; 703 NW2d 440 (2005).

Most recently, in *People v Williams*, 475 Mich 101; 715 NW2d 24 (2006), the defendant (who killed one person) was convicted of first degree premeditated murder, first degree felony-murder, and the predicate felony. The Court of Appeals had combined the two murders into one, and vacated the predicate. This Court set the prosecutor's application for argument, directing supplemental briefing on 3 issues: (1) whether *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), which had directed that the two murders be combined into one count of first degree murder supported by dual theories, was correctly decided; (2) whether, if the felony-murder aspect of the case were later reversed, on habeas or otherwise, there would be any real world consequences of having set aside the predicate conviction; and (3) whether the vacated predicate conviction could be revived if the felony-murder aspect of the murder count were later set aside. *Williams*, 475 Mich 882-883 (2005). Then, in lieu of granting leave, the Court issued a brief opinion affirming the Court of Appeals, declining to reconsider *Bigelow*. This Court's only statement of reasoning was to state that, if the felony-murder was later vacated, the predicate felony conviction would be resurrected. *Williams* 475 Mich at 103-105. In all other respects, this Court denied leave to appeal. *Williams* 475 Mich at 1095 n 3. In *Williams* the Court did not address the issues presented in this case.

[14] But see footnote 11, *supra*, discussing *Wilder*. The People also disagree with the statement in *Robideau* regarding the significance of the rule of lenity, for the reasons discussed *infra* in footnote 22.

intended the offenses to be the "same".

However, the People submit that the *Robideau* opinion's rejection of the *Blockburger* elements test as a tool to assess legislative intent was unnecessary and incorrect. The *Blockburger* test is not utterly without value in assessing legislative intent. A comparison of elements of offenses, in particular a determination of whether one offense is a necessarily-included lesser offense of the other, is a worthwhile point of examination in assessing whether offenses were meant to be the "same" for double jeopardy purposes. It may generally be presumed that the Legislature did not intend a defendant to be convicted of both a lesser-included offense and the greater offense (a presumption that can, of course, be rebutted by evidence of a contrary legislative intent). *Robideau* 419 Mich at 486. This is a proposition that had often been recognized by this Court, dating all the way back to *Martin*, and, even after *Robideau*, this Court recognized *Blockburger*'s value as a "rough proxy" in assessing legislative intent. *Sturgis*, 427 Mich at 409. Conversely, where a lesser-greater relationship does not exist between offenses, they are presumably distinct. The fact that application of the *Blockburger* test will, in some categories of cases (namely lesser-greater offenses), lead to predictable results does not render the test useless. Rather, it reflects the sort of logical consistency that is desirable.

The order granting leave to appeal in this case posed the question: which is the proper test, *Blockburger* or *Robideau*? The People answer by asserting that the proper test is a somewhat modified *Robideau* – modified to allow the *Blockburger* test to be a component of the analysis. As a practical matter, the analysis in *Robideau* is, for the most part, not inconsistent with *Blockburger*. Under both tests legislative intent lies at the heart of multiple-punishment analysis. Both recognize that the multiple-punishment strand of double jeopardy does not act as a constraint on the Legislature but constrains the courts and prosecutors to ensure that a defendant

is not subjected to more punishment than intended by the Legislature. *Robideau* and *Blockburger* both strive toward the same goal (discerning legislative intent) they simply follow somewhat different paths to get there. In arguing that *Blockburger* is a worthwhile factor to consider, the People are not asserting that the U.S. Supreme Court, contrary to established principles of federalism, can impose on this state the method by which it must interpret the actions of its own Legislature or that the so-called *Blockburger* test is compelled by the Double Jeopardy Clause of the Michigan constitution – neither of which is correct, as discussed *supra*. But the People urge the Court to apply an elements test, à la *Blockburger*, as one tool (among others) to assess legislative intent simply because it makes sense to do so. Further, in applying that elements test, the People submit that the proper focus is the abstract elements of the offenses, not the facts of a particular case, a matter discussed in Issue II.

II. UNDER THE MICHIGAN CONSTITUTION FELONY-MURDER AND THE PREDICATE FELONY ARE NOT THE "SAME" OFFENSE AND MAY BE CUMULATIVELY PUNISHED. MOREOVER, FELONY-MURDER AND A NON-PREDICATE FELONY ARISING OUT OF THE SAME TRANSACTION ARE NOT THE "SAME" OFFENSE AND MAY BE CUMULATIVELY PUNISHED.

Standard of Review

A double jeopardy challenge presents a question of constitutional law subject to de novo review. *Nutt* 469 Mich at 573.

Analysis

The next question concerns how the Michigan standard applies in the context of felony-murder and the predicate felony. Did the Legislature intend for these two offenses to be treated as the "same" for purposes of multiple punishment?

A. Felony-murder and the predicate felony are not the "same" offense under the Michigan Constitution.

The traditional sources of legislative intent outlined in *Robideau*, as well as the so-called *Blockburger* test, lead to the conclusion that the Legislature intended to permit multiple punishments for felony-murder and the predicate felony, i.e. they were not intended to be the "same" offense.[15]

Felony-murder and the predicate offenses each contain elements not contained in the other. In examining the elements of the offenses, the proper focus is the abstract elements of the offenses, not the facts of the particular case, *Robideau* 419 Mich at 485; *Wayne Prosecutor* 406 Mich at 395-398.[16] In *Robideau* and *Wayne Prosecutor*, this Court held that a defendant could be subjected to multiple punishments for both the compound crime and its predicate. The same

[15] Many states that have addressed this issue, have concluded that multiple punishments were intended for felony-murder and the predicate felony. See e.g. *Todd v State*, 917 P2d 674, 679-682 (Alaska, 1996); *State v Gerlaugh*, 134 Ariz 164; 654 P2d 800, 806 (1982); *State v Greco*, 216 Conn 282; 579 A2d 841, 89-91 (1990); *Martin v State*, 433 A2d 1025, 1039 (Del, 1981); *State v Enmund*, 376 So2d 165, 166-168 (Fla, 1985); *State v Sutton*, 256 Kan 913; 889 P2d 755, 760 (1995); *State v Close*, 191 Mont 229; 623 P2d 940, 949-951 (1981); *Talancon v State*, 102 Nev 294; 721 P2d 764, 766-768 (1986); *State v Watson*, 154 Ohio App 3d 150; 796 NE2d 578, 581 (2003); *State v Blackburn*, 694 SW2d 934, 935-937 (Tenn, 1985); *State v McCovey*, 803 P2d 1234, 1237-1239 (Utah, 1990); *Fitzgerald v Commonwealth*, 223 Va 615; 292 SE2d 798, 809-811 (1982).

Some states, however, have held that multiple punishments were not intended, e.g. *Callis v People*, 692 P2d 1045, 1053-1055 (Colo, 1984); *Sivak v State*, 112 Idaho 197; 731 P2d 192, 205-208 (1986); *Collier v State*, 470 NE2d 1340, 1341-1342 (Ind, 1984); *Newton v State*, 280 Md 260; 373 A2d 262, 264-270 (1977); *Shabazz v Commonwealth*, 387 Mass 291; 439 NE2d 760, 762 (1982); *Meeks v State*, 604 So2d 748, 750-753 (Miss, 1992); *State v Olds*, 603 SW2d 501, 509-510 (Mo, 1980); *State v Contreras*, 120 NM 486; 903 P2d 228, 231-233 (1995); *State v Innis*, 120 RI 641; 391 A2d 1158, 1164-1167 (1978), rev'd on oth grds 446 US 291 (1980); *Cook v State*, 841 P2d 1345, 1347-1354 (Wyo, 1992).

[16] A majority of the states have opted to employ an elements-based approach to the multiple punishment inquiry. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 Rutgers L J 351, 431 & n 257 (2005).

result should be reached in this case. Felony-murder contains elements not included in the predicate felonies, namely a killing and malice. See *Wayne Prosecutor* 406 Mich at 396-397. Conversely, the predicates contain elements not necessarily included in felony-murder. For instance, armed robbery requires proof that the defendant was armed with a dangerous weapon and assaulted the victim[17], neither of which is necessarily required for a felony-murder. In fact, viewing the statutory elements of the offenses in the abstract, it is possible to commit the crime of felony-murder without committing any particular predicate felony such as robbery – any listed felony would do. *Wayne Prosecutor*, 406 Mich at 397-398; Dressler, *Understanding Criminal Procedure* 3d ed (2002), pp 719-720. No single predicate is necessary to every felony-murder case.

Although it could be argued that, in a given case, a particular predicate is necessary to *that* felony-murder charge, such a myopic view cannot plausibly serve the goal of ascertaining legislative intent. Because the *Blockburger* elements test is a rule of statutory construction, it more naturally applies to the abstract statute drafted by the Legislature rather than to the charges in a particular case. See *Whalen v United States*, 445 US 684; 100 S Ct 1432, 1448; 63 L Ed 2d 715 (1980)(Rehnquist, C.J., dis). Moreover, as this Court made clear in *Robideau* and *Wayne Prosecutor*, it does not matter that, under the facts of this case, the charged felony-murder could not have been committed without committing a larceny/armed robbery – that sort of fact-specific analysis should not be used. The proper focus is on the statutory elements.

The appropriateness of an abstract elements approach to assessing the offenses is

[17] Assault is a specific intent crime, CJI2d 17.1. Assault is defined as either an attempted battery or an unlawful act that places another in reasonable apprehension of an imminent battery. *People v Musser*, 259 Mich App 215, 223; 673 NW2d 800 (2003) .

reinforced by this Court's recent rulings in the area of lesser-included offenses. In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), this Court held that in enacting MCL 768.32(1), the Legislature evidenced its intention to limit the number of offenses viewed as lesser-included. Cognate (or related) lesser offenses are no longer recognized in Michigan. In assessing lesser-included offenses, this Court now focuses on the abstract elements – not the facts of the particular case. *Cornell* 466 Mich at 353-355, 360-361; *People v Mendoza*, 468 Mich 527, 532-533 & 540-541; 664 NW2d 685 (2003); Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 Rutgers L J 351, 413 & n 257 (2005)(a majority of the states, including Michigan, now follow this approach). The Legislature's intent that the same limits apply in the double jeopardy context is shown in MCL 768.33, a statutory protection against successive prosecutions,

> When a defendant shall be acquitted or convicted upon any indictment for an offense, consisting of different degrees, he shall not thereafter be tried or convicted for a different degree of the same offense; nor shall he be tried or convicted for any attempt to commit the offense charged in the indictment or to commit any degree of such offense.

This provision notably mirrors MCL 768.32(1) in its reference to offenses consisting of different degrees, which this Court in *Cornell* construed as meaning necessarily-included lesser offenses.

Because a given predicate is not a necessarily-included lesser offense of felony-murder, we may presume that the Legislature did not intend them to be the "same offense".

The conclusion that the offenses were not intended to be the "same" is also reinforced by consideration of the other factors listed in *Robideau*. Matters traditionally considered in assessing the Legislature's intent include whether the statutes prohibit conduct violative of distinct social norms, and whether the statutes are hierarchical or cumulative, which may be

evidenced by the amount of punishment authorized by each statute. *Robideau*, 419 Mich at 487-488.

Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishment. *Robideau*, 419 Mich at 487. Felony-murder punishes harm in the form of a killing with malice. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).[18] That homicide offense cannot reasonably be characterized as an enhanced or aggravated form of the predicate felony. The predicate felonies for felony-murder listed in MCL 750.316, are non-homicide offenses aimed at distinct societal interests.[19] Armed robbery, for instance, is aimed at protecting against forceful takings of the property of another. *Harding* 443 Mich at 731-732 (Riley, J., con/dis); *People v Witt*, 140 Mich App 365, 371; 364 NW2d 692 (1985). Because the murder and the predicate are aimed at distinct societal interests, it may be inferred that the Legislature intended them not to be the "same offense". *Robideau*, 419 Mich at 487.

The offenses are set forth in distinct statutes, each of which states a distinct penalty, rather than merely enhancing or multiplying the penalty for the other offense. Thus, the penalties do not make the offenses appear hierarchical. The variation in penalty between the predicate and

[18] Michigan does not impute malice from participation in the predicate felony, *Aaron* 409 Mich at 727. Malice is required for all murders, whether they occur in the course of a felony or otherwise, *Aaron* 409 Mich at 728.

[19] The statute in effect at the time of the offenses in this case referred to the following predicate offenses,

> arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion or kidnapping.

felony-murder varies depending on which predicate is relied upon.[20] Many listed predicates are subject to the severe penalty of up to life in prison, and felony-murder is punishable by life in prison. As to those offenses there is no great disparity. *Harding*, 443 Mich at 730 (Riley, J, con/dis).[21] In any event, differences in penalty do not necessarily mean the offenses are hierarchical. *Harding*, 443 Mich at 730 n 23 (Riley, J, con/dis); but see *Harding* 443 Mich at 711-712 & 735. In fact, predicate and compound crimes of this sort do not reflect a continuum of culpability. See *Wilder* 411 Mich at 360 (Ryan, J., con). A felony-murder cannot reasonably be characterized as an aggravated form of the predicate felony. On the contrary, it is a crime of an entirely different character.

Because these tools for determining legislative intent demonstrate an intent to allow multiple punishment, there is no ambiguity that might conceivably call into play the rule of lenity. See *Robideau* at 488; see also *Albernaz v United States*, 450 US 333, 340-342; 101 S Ct 1137; 67 L Ed 2d 275 (1981); *Garrett v United States*, 471 US 773, 793-794; 105 S Ct 2407; 85 L Ed 2d 764 (1985).[22]

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[20] The People submit that a literal comparison of sentences of not highly useful in this case. In fact, a focus on the relative punishments could conceivably lead to the peculiar result that some predicates would be viewed as lesser included offenses of felony murder while others are not.

[21] See discussion in footnote 11, *supra*.

[22] In any event, the Legislature has pronounced in MCL 750.2, its intention that the rule of lenity not be imposed in construction of the Penal Code. *People v Morris*, 450 Mich 316, 327; 537 NW2d 842 (1995); see also *People v Denio*, 454 Mich 691, 699-700; 564 NW2d 13 (1997); *Stajos v City of Lansing*, 221 Mich App 223, 229; 561 NW2d 116 (1997). MCL 750.2 states,

> The rule that a penal statute is to be strictly construed shall not apply to this Act [the Michigan Penal Code] or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.

(footnote continued on next page)

In light of this evidence of legislative intent, *Wilder*, 411 Mich 328, should be overruled. *Wilder* was decided during the brief interval in which this Court held that the multiple-punishment strand of double jeopardy under the Michigan constitution afforded broader protections than the Fifth Amendment. A stance that this Court subsequently disavowed and that was inconsistent with the intent of the ratifiers of our state constitution. The *Wilder* analysis relied on a fact-specific analysis of the elements of the offenses and upon the fact that the predicate felony was a cognate lesser offense of felony-murder in holding that punishment for both was barred. Current law, however, is now to the contrary on both these points. As discussed above, under an elements-based approach, a predicate felony is not necessarily included in the compound offense.

Looking to the elements of the offenses as well as other traditional means of assessing legislative intent leads to the conclusion that the Legislature intended to allow cumulative punishment for the predicate felony and felony murder.

B. Even if felony-murder and the predicate felony are the "same" offense under the Michigan Constitution, there is no legal support for the notion that felony-murder and a non-predicate felony are the "same".

Even if this Court concludes that the predicate felony and felony-murder are the "same" for multiple-punishment purposes, this case presents a variant on the question. In this case, Defendant was not separately convicted of the predicate offense. Defendant was charged and

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Because legislative intent lies at the heart of the inquiry in this case, this clear statement of intent is illuminating. Application of the rule of lenity is contrary to the Legislature's intent as expressed in statute and is not a constitutional mandate.

Although, in *Robideau* 419 Mich at 488, the Court stated that the rule of lenity applies if there is no conclusive evidence of legislative intent, this Court apparently did not take into account MCL 750.2. In any event, here as in *Robideau* there are indicators of legislative intent, so there is no ambiguity.

convicted of felony-murder during the course of a larceny. Defendant was not convicted of larceny, he was convicted of armed robbery, and the Court of Appeals vacated his armed robbery convictions on double jeopardy grounds. Because armed robbery was ***not*** the predicate felony for the felony-murder charges, double jeopardy principles do not justify setting aside Defendant's convictions and sentences for armed robbery (or the accompanying felony-firearm convictions).

It cannot be said that felony-murder and a non-underlying felony are the "same offense" for double jeopardy purposes. Even if the Court rejects the People's argument that the proper focus is the abstract elements of the offenses and opts to look to how the charges were framed in this case, the offenses are distinct in this case because as charged, armed robbery is not necessarily included in the offense of felony-murder during the course of a larceny. The People are not aware of any case in which this Court has applied double jeopardy to vacate non-predicate felonies and there is no principled basis for doing so now.

Although armed robbery was not the predicate felony in this case, the Court of Appeals held that the predicate larceny was subsumed in the charged armed robbery, and therefore the armed robbery convictions must be set aside. However, the People assert that this reasoning is flawed. The People acknowledge that larceny is generally a lesser-included offense of armed robbery.[23] But, if the Court is of the view that the predicate larceny would also be a lesser-included offense of the felony-murder charges in this case, it does not follow that the charged

[23] As discussed *infra*, the facts of this case could support a finding that the armed robberies arose from separate takings of property – apart from the larceny(s) forming the basis for the felony-murder charges. However, for purposes of the point now under discussion, even if the robbery counts arose out of the same taking of property as the larceny(s) underlying the felony-murder charges, the robbery convictions should not be set aside because robbery was not the predicate felony.

armed robbery is also pulled in as a lesser-included offense.[24] The crime of armed robbery contains elements not included in the crimes of larceny or felony-murder during the commission of larceny. One can commit the latter offenses without being armed with a dangerous weapon and/or without assaulting the victim. This is not a situation in which the proofs required to convict of the felony-murder charge "necessarily included first proving culpability as to [armed robbery]", cf. *Wilder* 411 Mich at 346. On the contrary, the jury in this case could have convicted Defendant of the felony-murder charge without finding all the elements of the armed robbery charge to have been proven. By vacating the armed robbery convictions in this context, the Court of Appeals vacated jury findings **not** necessarily subsumed in the felony murder convictions – namely the findings on the elements of armed robbery not incorporated in the charged felony-murder offense. Double jeopardy does not require such a result. On the contrary, the People submit that there is no legal basis to set aside valid, non-redundant jury determinations. Where, as here, a non-predicate felony conviction is set aside, the appellate court is negating jury findings – i.e. wiping out findings not reflected in the remaining conviction(s) – without legal justification.[25]

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[24] The analysis used by the Court of Appeals would make more sense if the defendant had been convicted of felony murder during the course of a robbery and also been convicted of larceny. But that is not what happened here.

[25] Defendant may try to argue that such a "technicality" in charging should not affect the outcome. But the manner in which the crime is charged is a matter of great significance – it frames the nature of the case and the elements that must be proven. Prosecutors have wide discretion in charging. See *People v Venticinque*, 459 Mich 90, 100-101; 586 NW2d 732 (1998); *Genessee Prosecutor v Genessee Circuit Judge*, 386 Mich 672, 683-684; 194 NW2d 693 (1972). And discretionary prosecutorial charging decisions routinely impact the matters to be proven at trial and the range of potential outcomes for the case and sentencing consequences for the defendant. See *People v Conat*, 238 Mich App 134, 149-150; 605 NW2d 49 (1999). There is nothing improper in the prosecutor's exercise of discretion in this manner. And there is no rule of law stating that a conviction of felony-murder justifies setting aside every other conviction, whether or not it is the predicate.

Because armed robbery was not the predicate felony for the felony-murder charges, Defendant may, consistent with double jeopardy protections, be convicted and sentenced for both felony-murder during the course of a larceny and armed robbery.

Under the preceding analysis, the armed robbery convictions should not have been set aside even if the larceny and the armed robberies arose out of a single taking of property. However, even if this Court disagrees with the preceding analysis, the Court of Appeals nonetheless erred in vacating Defendant's armed robbery convictions because the facts of this case could support a jury finding that separate takings of property were involved. The evidence at trial showed that Defendant stole money from the cash drawer of the store, and that he also stole money from the persons of both victims. The jury may well have concluded (a) that a murder was committed during the commission of a larceny from the cash drawer, and that Defendant also robbed the victims of their wallets and cash while armed with a gun; or (b) that Defendant held the victims at gun point, robbing them of the contents of the cash drawer; and then murdered them to facilitate his larceny of their wallets. Under either of these scenarios, separate, unrelated takings occurred, rendering the armed robbery counts wholly separate from the felony-murder counts. In this context, the armed robbery convictions (and their accompanying felony-firearm convictions) should not have been set aside. See *People v Wilson*, 242 Mich App 350, 360-362; 619 NW2d 413 (2000) .

III. *BLOCKBURGER* IS THE STANDARD APPLICABLE TO MULTIPLE-PUNISHMENT CLAIMS UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION. UNDER THAT STANDARD, FELONY-MURDER AND THE PREDICATE FELONY ARE NOT THE "SAME" OFFENSE AND MAY BE CUMULATIVELY PUNISHED. MOREOVER, FELONY-MURDER AND A NON-PREDICATE FELONY ARISING OUT OF THE SAME TRANSACTION ARE NOT THE "SAME" OFFENSE AND MAY BE CUMULATIVELY PUNISHED.

Standard of Review

A double jeopardy challenge presents a question of constitutional law subject to de novo review. *Nutt*, 469 Mich at 573.

Analysis

Because Defendant argued in the Court of Appeals that the punishments imposed in this case violated the federal Double Jeopardy Clause, and because that clause applies to the states, *Benton* 395 US at 794, the People will also address the instant case under the federal multiple-punishment strand of double jeopardy. Applying the federal standard, Defendant may properly be convicted and sentenced for both felony-murder and the predicate felony.

A. The multiple-punishment strand of federal double jeopardy.

Under the federal Double Jeopardy Clause, the test for multiple-punishment focuses on legislative intent.

Pursuant to *Blockburger*, 284 US at 304, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not. If each has an additional element, it is presumed that the Legislature intends them to be viewed as separate and warranting multiple punishment – a presumption that can be rebutted by clear evidence of a contrary legislative intent. *Albernaz v United States*, 450 US 333, 337-339; 101 S Ct 1137; 67 L Ed 2d 275 (1981). Conversely, if each offense does not contain an element not included in the other, it is presumed that the Legislature intends them to viewed as the "same", not subject to multiple punishment – a presumption that can be rebutted by clear evidence of a contrary legislative intent. But, because effectuating legislative intent lies behind the multiple-punishment protection, if the Legislature intends to authorize cumulative

punishment under two statutes, even if those two statutes proscribe the "same" conduct under *Blockburger*, multiple punishments at a single trial are permissible. *Hunter*, 459 US at 368.

Some factors the U.S. Supreme Court has examined in assessing legislative intent (aside from assessment of the elements under *Blockburger*) include whether the offenses were created in separate statutes, each of which authorized a stated punishment for its violation (rather than simply employing a multiplier for the penalty for another offense), *Albernaz* 450 US at 336; *Garrett v United States*, 471 US 773, 779-781; 105 S Ct 2407; 85 L Ed 2d 764 (1985); but see *Rutledge v United States*, 517 US 292, 304 n 14; 116 S Ct 1241; 134 L Ed 2d 419 (1996); and whether the offenses serve distinct societal interests. *Albernaz* 450 US at 343; *United States v Woodward*, 469 US 105, 109; 105 S Ct 611; 83 L Ed 2d 518 (1985); *Ball v United States*, 470 US 856, 864; 105 S Ct 1668; 84 L Ed 2d 740 (1985).

There is no necessity for the Legislature to expressly state that multiple punishments are intended, the other factors can demonstrate that intent. *Garrett* 471 US at 784-785. Further, the fact that the Legislature has not expressly stated that multiple punishments are intended does not inject ambiguity into the equation. *Albernaz* 450 US at 340-342; *Garrett* 471 US at 793-794.[26]

Stating that the *Blockburger* test applies to multiple-punishment cases under the Fifth Amendment leads to the next question: how is *Blockburger* to be applied? Courts and commentators have urged several variants: (a) an elements approach that looks to the abstract elements of the statutes; (b) a pleadings approach that looks to the manner in which the charges

[26] In the U.S. Supreme Court the rule of lenity is a rule of statutory construction, not an inherent part of the double jeopardy clause, and, as such, has only been applied to federal statutes. Thomas, *Multiple Punishments for the Same Offense: the Analysis After Missouri v Hunter or Don Quixote, the Sargasso Sea, and the Gordian Knot*, 62 Wash U L Q 79, 109 & 115 (1984).

were framed; and (c) an evidence approach that looks to the proofs at trial.

The U.S. Supreme Court has stated that it applies a statutory elements approach. In *Ianelli* 420 US at 785 n 17, the Court stated that the test looks to the statutory elements, and that it is beside the point that there may be a substantial overlap in the proofs to establish the offenses. *Id*. For instance, if commission of one offense is a means of proving an element of a greater offense, but not the exclusive means, it is not viewed as a true lesser offense under *Blockburger*, and multiple punishments are permitted. *Illinois v Vitale*, 447 US 402, 418-419; 100 S Ct 2260; 65 L Ed 2d 228 (1980); *Woodward* 469 US at 108.

However, decisions from the United States Supreme Court applying *Blockburger* are not a great model of clarity or uniformity.[27] Although the Court consistently claims to be using an elements approach when applying *Blockburger*, see *Ianelli*, 420 US at 785 n 17; *Brown* 431 US at 166; *Vitale* 447 US at 416, the results are sometimes difficult to reconcile with that approach, particularly in the area of predicate and compound offenses. However, something approaching continuity and consistency can be found in the cases when the reader takes into account (a) whether the statutory offenses at issue are federal offenses or state offenses, and (b) whether each case is a pure, i.e. single-proceeding, multiple punishment case[28]. These characteristics of the cases explain many [but not all] apparent inconsistencies.

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[27] Phrases such as "a veritable Sargasso Sea", "the Gordian Knot", and "Double Talk" have been used to describe the caselaw in this area. *Albernaz v United States*, 450 US 333; 101 S Ct 1137, 1144; 67 L Ed 2d 275 (1981); *Robideau* 419 Mich at 468-469; Thomas, *Multiple Punishments for the Same Offense: the Analysis After Missouri v Hunter or Don Quixote, the Sargasso Sea, and the Gordian Knot*, 62 Wash U L Q 79 (1984); Amar, *Double Jeopardy Law Made Simple*, 106 Yale L J 1807, 1807-1808 (1997).

[28] Multiple-punishment analysis occasionally comes into play in successive-prosecution cases to ensure that, after a subsequent conviction, the defendant receives credit for time already served for the first conviction. *Ohio v Johnson*, 467 US 493, 499; 104 S Ct 2536; 81 L Ed 2d 425

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In cases involving federal (or District of Columbia) offenses, the U.S. Supreme Court is free to assess the interrelation of offenses and their elements to ascertain the intent of Congress without the sort of constraints that apply to its review of state law cases. Where state offenses are at issue, the U.S. Supreme Court has recognized that it is bound by the state court's assessment of elements and whether a lesser-greater relationship exists between the statutory offenses. *Brown*, 431 US at 167; *Whalen* 445 US at 688-689; *Vitale*, 447 US at 416-417; *Hunter*, 459 US 359, 368. Where the U.S. Supreme Court has assessed predicate/compound crimes charged under federal statutes, they have sometimes concluded that the predicates are included offenses, *Whalen* 445 US at 693-694; but see *Garrett* 471 US at 780-785 & 793-794 (predicate offense held not to be the "same"). However, in state law cases, the U.S. Supreme Court defers to the state court's determination of whether the predicate offense is or is not a true lesser offense of the compound offense. *Brown* 431 US at 167; *Vitale* 447 US at 416-417; *Hunter* 459 US at 368.

Cases involving successive prosecution (unlike single proceeding cases) necessarily incorporate the special concerns and interests applicable in that context, namely the historical protection against being made to suffer the anxiety and uncertainty of running the gauntlet a second time. Those concerns are, of course, not implicated in a single-trial setting. See *Robideau* 419 Mich at 484-485. Although ultimately the U.S. Supreme Court indicated that "same offense" should mean the same thing in both successive-prosecution and multiple-punishment cases, *United States v Dixon*, 509 US 688, 704; 113 S Ct 2849; 125 L Ed 2d 556 (1993)[29], earlier cases

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(1984). Where a defendant has improperly been subjected to multiple punishments, the remedy is to vacate the shorter sentence and award Defendant credit against the greater sentence for any time already served on the shorter sentence. *Jones v Thomas* 491 US 376; 109 S Ct 2522; 105 L Ed 2d 322 (1989).

[29] The People submit that this holding simply means that *Blockburger* is the standard applicable in both contexts. Such an interpretation is the only means of reconciling the statement with the

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seemed to approach the two contexts from different viewpoints, construing "same" offense more broadly in successive-prosecution cases. See *Garrett* 471 US at 786-787 (noting that in successive prosecution cases the Court looks to how the charges were framed in the case); see also discussion in *Grady v Corbin*, 495 US 508, 519-521; 110 S Ct 2084; 109 L Ed 2d 548 (1990).

Two cases warrant special attention here because they involve multiple-punishment as applied to convictions for both felony-murder and the predicate felony.

In *Harris v Oklahoma*, 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977), the U.S. Supreme Court held in a very brief peremptory per curiam opinion that a defendant who had been convicted of felony-murder could not thereafter be tried for the predicate robbery (a successive prosecution case). At the outset, it must be noted that the precedential value of this sort of peremptory ruling is questionable. See *Dixon* 509 US at 716 (Rehnquist, C.J., con.dis). It should also be noted that in *Harris* the state had conceded that the predicate robbery was necessarily included in the felony-murder, *Harris* 433 US at 682 n *. In light of that concession (and the Court's previously-stated reluctance to assess matters of state law) the Court viewed the two offenses as the "same". *Harris* 433 US at 682-683.[30]

The U.S. Supreme Court later indicated that the result *Harris* was not really consistent

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Court's other holdings that *Blockburger* is not a hard-and-fast constitutional rule in the multiple-punishment setting and cannot limit the power of the Legislature to define crime and set parameters for punishment.

[30] *Harris* was later relied upon in a peremptory order in *Payne v Virginia*, 468 US 1062; 104 S Ct 3573; 82 L Ed 2d 801 (1984). *Payne* was another successive prosecution case involving a conviction of felony murder and then a subsequent trial for the predicate robbery. The Court held that second trial impermissible under *Harris*.

with *Blockburger*, and attributed its result to its status as a successive-prosecution case. *Harris* was cited as an example of a case where the Court had held that "strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause". *Grady* 495 US at 519-520. The Court noted that *Harris*, stood for the proposition that "a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials", *Grady* 495 US at 520; but see *Dixon*, 509 US at 706-707.[31] In fact, in *Robideau, supra* at 476, this Court concluded that if *Harris* had been analyzed as a multiple-punishment case, multiple punishments would have been allowed.

The felony-murder issue again came before the U.S. Supreme Court in *Whalen v United States*, 445 US 684; 100 S Ct 1432; 63 L Ed 2d 715 (1980). There the defendant was convicted in a single proceeding of felony-murder and the predicate rape under District of Columbia statutes. The Court noted that, because it was a District of Columbia case, the Court did not have to defer to any court's interpretation of the applicable statutes. *Whalen* 445 US at 667-668. The Court held that cumulative punishments were not intended because, under *Blockburger*, it was not true that each offense contained an element not included in the other. *Whalen* 445 US at 693-694. The Court rejected the government's argument that felony-murder did not always require a rape, that it could be another listed felony, *Whalen* 445 US at 694,

> In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included [predicate] offenses in the alternative, had separately

[31] The continued viability of *Harris* in double jeopardy law has also been characterized as "unstable" due to subsequent changes in Court personnel. Dressler, *Understanding Criminal Procedure* 3d ed (2002), p 723.

> proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it. To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity.

In dissent, Justice Rehnquist expressed the view that *Blockburger* had limited value in cases involving predicate and compound crimes. *Whalen* 445 US at 708-711 (Rehnquist, CJ., dis). And that, in any event, because the *Blockburger* test is a rule of statutory construction it would be more natural to apply it to the abstract statute drafted by Congress rather than to the indictment in the particular case. *Whalen* 445 US at 711 (Rehnquist, CJ., dis).

Although these cases both resulted in a ruling that the conviction of the predicate should be set aside, these cases do *not* stand for the proposition that a state law defendant cannot be punished for both felony-murder and the predicate felony following a single trial. The result in *Harris* has been recognized as attributable to its status as a successive-prosecution case and, in any event, the state did not even argue in *Harris* that the predicate was not a lesser offense under *Blockburger*. In *Whalen* the U.S. Supreme Court was construing statutes passed by Congress for the District of Columbia, and that analysis can not be transposed into a state law context. The U.S. Supreme Court has made abundantly clear that interpretation of state statutes and determinations regarding lesser-offense status are decisions to be left to the state courts. Thus, *Harris* and *Whalen* are not dispositive regarding application of the Fifth Amendment to the case now before the Court. The People submit that, for the reasons discussed in subsection B of this Issue, conviction and sentence for both offenses following a single trial is permissible under the multiple-punishment strand of the Fifth Amendment.

B. Under the federal test felony-murder and the predicate felony are not the "same" offense.

Applying *Blockburger* to this case, felony-murder and the predicate felony are presumptively not the "same" offense. As discussed in Issue II, viewing the elements of the offenses in the abstract, as a matter of state law, each offense includes an element not included in the other. No singular predicate is a necessarily-included lesser included offense of felony-murder in Michigan. This conclusion is buttressed by the fact that distinct societal interests are served by the offenses. See *Albernaz* 450 US at 343; *Woodward* 469 US at 109; *Ball* 470 US at 864.

The U.S. Supreme Court has recognized that it must defer to the state court's determination of whether the predicate offense is or is not a true lesser offense of the compound offense. *Brown* 431 US at 167; *Vitale* 447 US at 416-417; *Hunter* 459 US at 368; see also *Harding* 443 Mich at 707 & 735 n 2. After all, state courts have the final authority to interpret their state's legislation. Because the Michigan Legislature intended that felony-murder and the predicate felony be separate offenses, multiple punishment is permissible under the Fifth Amendment.

C. Even if felony-murder and the predicate felony are the "same" offense under the federal constitution there is no legal support for the notion that felony-murder and a non-predicate felony are the "same".

Under *Blockburger* and under state law, felony-murder during the course of larceny and the non-predicate of armed robbery each contain an element not included in the other. Therefore, it is presumed that multiple punishments were intended. No U.S. caselaw supports the notion that a non-predicate felony must be set aside under multiple-punishment analysis upon conviction of felony-murder. The fact that the offenses arose during the same criminal transaction does not render them the "same" offense. *Albrecht* 273 US at 11.

RELIEF

WHEREFORE, David Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Kathryn G. Barnes, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse that portion of the Court of Appeals' opinion that vacated Defendant's convictions and sentences for armed robbery (and their accompanying felony-firearm offenses) and reinstate those convictions and sentences.

Respectfully submitted,

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